

BEFORE THE TENNESSEE REGULATORY AUTHORITY

RECEIVED

2013 SEP -6 PM 3:12

IN RE:

INVESTIGATION AS TO WHETHER A  
SHOW CAUSE ORDER SHOULD BE  
ISSUED AGAINST BERRY'S CHAPEL  
UTILITY, INC. AND/OR LYNWOOD  
UTILITY CORPORATION FOR  
VIOLATION OF TRA RULE AND  
TENNESSEE STATUTES, INCLUDING  
BUT NOT LIMITED TO,  
TENN. CODE ANN §§  
65-4-112, 65-4-113, 65-4-201, AND 65-5-101

T.R.A. DOCKET ROOM

DOCKET NO. 11-00065

**MOTION IN LIMINE**

Comes now the Tennessee Regulatory Authority staff participating as a party ("Party Staff") who respectfully objects to the introduction as evidence or use for demonstrative purposes of either of the items attached to this Motion in Limine as Exhibits A and B. In support thereof Party Staff would show as follows:

1. Late in the afternoon of September 4, 2013, fourteen days after the Consumer Advocate filed their Reply Brief and more than thirty days after the Consumer Advocate filed their witness testimony they sent an email containing a document (Exhibit A) they proposed to introduce as evidence at the hearing on September 9, 2013.
2. On September 5, 2013, the Consumer Advocate sent a revised version (Exhibit B) to the Hearing Officer requesting that they be allowed to submit that version into evidence as well as utilize the original document (Exhibit A) as a demonstrative during the hearing.
3. Party Staff has two objections to these exhibits being used for any purpose.

I. The Documents are Untimely Filed

4. There is no witness testimony or other evidence in the record of this case which adopts either Exhibit A or B.
5. In fact the Consumer Advocate's witness is absolutely silent as to the contents of the document. While the Consumer Advocate may wish their witness had addressed these issues the fact is that he failed to do so.
6. The Consumer Advocate's eleventh hour request to use these documents is nothing more than an untimely effort to get around the Hearing Officer's July 18, 2013, Order Granting Joint Motion to Amend the Procedural Schedule and amend either their witness testimony or their brief.

II. The Documents Do Not Comport with Tennessee Rule of Evidence 1006

7. Don Payne's *Tennessee Law of Evidence* states that TRE 1006 requires that "[I]n order to be admissible, the summary must consist of and be limited to facts or data that the **testifying witness personally observed** from an examination of the records...."<sup>1</sup>
8. There is no proffering witness for the Consumer Advocate. Instead it appears they intend to utilize Party Staff's witness in the hopes that she will agree to the assertions made by the Consumer Advocate on cross examination without quibble.
9. Exhibits A and B are nothing more than an interpretation of how sections of the Authority's prior orders should be understood. It is not a summary of the orders as much as it is one side's view of the meaning of the orders.
10. Had the Consumer Advocate's witness considered the documents then perhaps there would have been a competent witness willing to testify to the Consumer Advocate's

---

<sup>1</sup> See Cohen, Neil, *Tennessee Law of Evidence* §1006[3](6<sup>th</sup> ed., 2011) emphasis added. A copy is attached as Exhibit C.

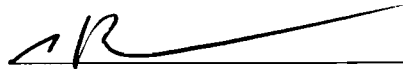
preferred view. However, their witness produced no such testimony and there is no competent witness willing to testify to the Consumer Advocate's exhibit.

### III. Conclusion

11. Counsel for Party Staff shares a desire to conduct this hearing as efficiently as possible and to ensure that the evidence is submitted without unnecessary objection. However, in this instance the facts clearly show that this is nothing more than an eleventh hour attempt to insert new testimony or argument into the proceeding without sufficient foundation for its admissibility or competency.

**WHEREFORE** the Court should sustain Party Staff's Objection to the use of Exhibits A and B.

Respectfully submitted,



Shiva K. Bozarth, BPR No.22685  
Legal Counsel  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I have served a copy of the foregoing document on the following persons by U.S. Mail:

Henry M . Walker  
1600 Division Street, Suite 700  
P.O. Box 340025  
Nashville, TN 37203

Charlena Aumiller  
Vance L. Broemel  
Assistant Attorney General  
Office of Attorney General  
Consumer Advocate and Protection Division  
P.O. Box 20207  
Nashville, TN 37202

This the 9<sup>th</sup> day of September, 2013.

  
\_\_\_\_\_  
Shiva K. Bozarth



Select Costs	This Settlement		Select Authorized Costs Approved in Tariffs				
	Odor Control /A	Flood Damage /B	Rate Case 07-00007 /C	Odor Control Surcharge 08-00060 /D	2007 Rate Case Tariff with Surcharge /E	Rate Case 09-00034 /F	Rate Case & Flood Damage 11-00198 /G
Sludge removal	25,516.67		20,000.00	13,604.97	33,604.97	34,617.00	39,691.00
Chemicals			20,870.00	7,166.74	28,036.74	42,450.00	44,093.00
Accounting (excluding Tax Accounting)	3,490.00		-	1,125.00	1,125.00	29,684.00	24,944.00
Legal Expenses	11,068.25	19,781.25	-	4,784.75	4,784.75	8,899.00	12,695.00
Rate Case Expense			26,400.00	-	26,400.00	36,000.00	64,000.00
Regulatory Expense (legal fees portion)			-	-	-	-	6,000.00
Total of Select Costs	40,074.92	19,781.25	67,270.00	26,681.46	93,951.46	151,650.00	191,423.00

/A: Per Ms. Underwood's Testimony, Schedule 1E. Per the invoices in Ms. Underwood's testimony, the period of costs range from 2008 to 2012.

/B: Per Ms. Underwood's Testimony, Schedule 1F. Per invoices in Ms. Underwood's testimony, the period of costs range from August 2011 to February 2013.

/C: Per *Order Approving Settlement Agreement*, Docket No. 07-00007, Ex. Schedules 2 and 2-9 (Dec. 11, 2007). According to *Petition*, Sch. 2.7 (Jan. 4, 2007), accounting and legal expenses were a component of "Contractual Services", which had an authorized recovery of \$196,147. Per *Petition*, Sch. 2.8 (Jan. 4, 2007), \$16,800 was requested for accounting expenses, and \$12,000 was requested for legal expenses. The precise amount of accounting and legal expenses included in "Contractual Services" is not provided in the order.

/D: Per *Order Approving Settlement Agreement*, Docket No. 08-00060, pg. 5 (Apr. 29, 2009).

/E: This is a sum of the authorized rates for select costs under the columns of Rate Case 07-00007 (/C) and the Odor Control Surcharge 08-00060 (/D).

/F: Per *Final Order*, Docket No. 09-00034, pgs. 5, 7 (Nov. 3, 2009). Footnote 6 references approval of undisputed expenses shown in *Supplemental Direct Testimony of Dave Peters*, Sch. 2 (Aug. 14, 2009).

/G: Per *Final Order*, Docket No. 11-00198, pgs. 8, 11-12 (Aug. 21, 2012). Footnote 56 references the detail of the regulatory expenses shown in *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, pg. 10 (May 22, 2012). Docket No. 11-00198, the petition for a rate increase, was consolidated with Docket No. 11-00180, the petition requesting cost recovery related to flood damage. The *Final Order* includes authorized cost recovery under both Docket No. 11-00198 and 11-00180.

BCUI  
Docket No. 11-00065  
Show Cause  
Odor Expenses

These  
will be  
tabs as opposed  
to handwritten on the  
documents

A

	BCUI	Staff	Differences	
2008 Legal Fees	1,940.00	-	(1,940.00)	A/
2008 Consulting Fees	1,125.00	125.00 <sup>(2)</sup>	(1,000.00)	D/
2009 Legal Fees	5,520.91	5,105.00 <sup>(2)</sup>	(415.91)	F/
2009 Consulting Fees	2,125.00	2,125.00 <sup>(2)</sup>	-	Dec 08 Invoice
2010 Consulting fees Jan 10 to June 10	625.00	500.00 <sup>(2)</sup>	(125.00)	G/
Waste Management July 09 to June 10	29,254.71	18,430.71 <sup>(1)</sup>	(10,824.00)	H/
2010 Consulting fees July 10 to Aug. 10	250.00	250.00 <sup>(2)</sup>	-	
Consulting fees Sept. 10 to June 11	875.00	-	(875.00)	I/
Waste Management July 10 to Aug. 10	7,085.96	7,085.96 <sup>(1)</sup>	-	
Waste Management Sept. 10 to June 11	12,761.42	-	(12,761.42)	C/
Visions Inc.	1,190.00	490.00 <sup>(2)</sup>	(700.00)	B/
Additional Legal Fees Odor	6,378.75	5,963.25 <sup>(3)</sup>	(415.50)	E/
Total Additional Expenses	69,131.75	40,074.92	(29,056.83)	

$$\Sigma(1) = 25,516.67$$

$$\Sigma(2) = 3,490$$

$$\Sigma(3) = 11,068.25$$

A/ Check Nos. 1096, 1231, 1252, 1381 and 1404 considered in Docket No. 0800060

B/ Check Nos. 7415 was Def. Flood Cost according to invoice and financials

C/ Check Nos. 7142 and 7220 considered in Docket No. 11-00198. Check Nos. 7029 and 7048 were classified as sludge.

D/ Check No. 1282 and 1366 were recovered in Docket No. 0800060. Check No. 1468 does not appear to have been charged to the odor account.

E/ Invoice No. 758932 appears to have only 3 hours worth of odor work at \$405 per hour.

F/ Invoice 1681 included \$10.91 for reimbursement for lunch and \$405 associated with a general matter instead of odorization.

G/ JV Entry no support.

H/ Check No. 2315 for \$140 was for flood work according to check stub and \$10,684 of sludge was built into rates.

I/ Invoices provided were not charged to odor.

BCUI

Docket No. 11-00065

Show Cause

Flood Expenses

Check No.	Invoice No.	Co. Amt	Staff Amt	Difference	
8298	738044	708.75	708.75	-	
8333	753664	-	-	-	
8298	775411	405.00	405.00	-	
8298	780543	708.75	605.00	(103.75)	A/
8333	785766	4,357.50	3,527.50	(830.00)	B/
1029	790885	7,366.25	7,158.75	(207.50)	C/
1283	795169	4,565.00	4,565.00	-	
1283	801590	933.75	933.75	-	
1283	807363	1,037.50	1,037.50	-	
1283	813125	415.00	415.00	-	
1283	835463	425.00	425.00	-	
				-	
Total		20,922.50	19,781.25	(1,141.25)	

A/ .25 hours removed should have been allocated to regulatory

B/ 2.0 hours removed should have been allocated to regulatory

C/ 0.5 hours removed should have been allocated to regulatory

/B



Order/  
Settlement

Company  
Exhibit  
Schedule 2

/C

**Lynwood Utility Corporation**  
**2006 Rate Case**  
**Pro-forma Income for the year ended December 31, 2006**

			2006
<b>Revenues</b>			
Sewer Fees	464,813		464,813
Inspection Fees	4,500		4,500
Late charges	6,717		6,717
	<u>476,030</u>		<u>476,030</u>
<b>Expenses:</b>			
<b>Operating &amp; Maintenance</b>			
Salaries & Wages/ benefits			-
Purchased Sewage Treatment	5,685		5,685
Sludge Removal Treatment	17,592	2,408 A/	<u>20,000</u>
Purchased Power	51,815		51,815
Chemicals	20,870		<u>20,870</u>
Material & Supplies	4,816		4,816
Contractual Services	291,421	(95,274) A/	<u>196,147</u>
Rents	16,667	(11,667) A/	5,000
Utilities	1,224	(918) A/	306
Insurance Expense	9,554		9,554
Testing	25,933		25,933
Customer Accounting	42,118	2,438 B/	44,556
Property Taxes and Other	30,510	(3,435) C/	27,075
Miscellaneous Expense	2,410		2,410
	<u>520,615</u>		<u>414,167</u>
Depreciation Expense	138,300	(1,960) D/	136,340
Amort of Cont. in Aid	(66,520)		(66,520)
Amort of Rate Case Cost		8,800 E/	8,800
Total Expenses	592,395	(99,608)	492,787
Income (Loss)	<u>(116,365)</u>	99,608	<u>(16,757)</u>

-> includes regulatory expenses. see Sch 2.7.  
Not listed separately since portion for regulatory expense is not provided.

- A/ Agreed upon adjustment with Consumer Advocates  
B/ Schedule 2.1  
C/ Schedule 2.11  
D/ Schedule 4  
E/ Schedule 2.9

Order/Settlement

  
Company  
Exhibit  
Schedule 2-9

**Lynwood Utility Corporation  
2006 Rate Case**

**Line  
No.**

**Rate Case Expense**

1	Prior Balance	\$ -
2	<u>Legal Expenses</u>	<u>14,000 A/</u>
3	<u>Accounting (\$600 per Month)</u>	<u>12,400 B/</u>
5	Proforma Balance	<u>\$ 26,400</u>

A/ Estimated expense Branstetter, Kilgore, Stranch & Jennings

B/ Estimated expense - Vision, Inc.

C/ Amortization over 3 years at \$8,800 per year

Petition

BRANSTETTER, STRANCH & JENNINGS, PLLC

ATTORNEYS AT LAW  
227 SECOND AVENUE NORTH

CECIL D. BRANSTETTER, SR.  
C. DEWEY BRANSTETTER, JR.  
RANDALL C. FERGUSON  
R. IAN JENNINGS\*  
DONALD L. SCHOLLES  
JAMES G. STRANCH, III  
JANE B. STRANCH

FOURTH FLOOR  
NASHVILLE, TENNESSEE 37201-1631

TELEPHONE  
(615) 254-8801

FACSIMILE  
(615) 250-3937

January 4, 2007

TERESA W. CHAN  
JOE P. LENISKI, JR.  
MARK A. MAYHEW  
J. GERARD STRANCH, IV  
MICHAEL J. WALL

\*ALSO ADMITTED IN GA

Sara Kyle, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

*Via Hand Delivery*

Attention: Sharla Dillon

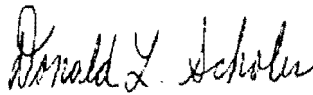
Re: Petition of Lynwood Utility Corporation To Change and Increase Rates and  
Charges  
Docket No. 07-00007

Dear Chairman Kyle:

Pursuant to T.C.A. § 65-5-103, I am enclosing an original and fourteen copies of a  
Petition of Lynwood Utility Corporation To Change and Increase Rates and Charges and a  
revised tariff effective February 3, 2007. In support of the Petition, I am enclosing an original  
and fourteen copies the direct testimony of Tyler Ring, President of Lynwood Utility  
Corporation.

I have enclosed a check for \$25.00 for the filing fee. Please return the additional copy of  
each document stamp filed. Thank you for your assistance.

Sincerely yours,



DONALD L. SCHOLLES

c: Tyler Ring  
Jim Ford  
Cynthia Kinser, Consumer Advocate

Petition

Company  
Exhibit  
Schedule 2-7

**Lynwood Utility Corporation  
2006 Rate Case**

**Contractual Services**

Prior Balance		\$ 243,762
Adjustments:		
Accounting Services	(45,000)	
Transportation Exp	(9,000)	
Outside Contractor Cost	(69,440)	
Regulatory Expense	(25,000)	
3% Cost Increase	<u>2,860</u>	
Total adjustments		(145,580)
		<u>\$ 98,182</u>

Petition

Company  
Exhibit  
Schedule 2-8

**Lynwood Utility Corporation  
2006 Rate Case**

**Line  
No.**

**Regulatory Expenses**

1	Prior Balance	\$ -
2	Legal Expenses	12,000 A/
3	Accounting (\$600 per Month)	7,200 B/
4	Consulting Expenses (\$800 per Month)	<u>9,600 C/</u>
5	Proforma Balance	<u>\$ 28,800</u>

A/ Estimated expense

B/ Estimated expense - Bookkeeping

C/ Estimated expense - Vision, Inc.

D

monthly bill insert explaining the surcharge for three consecutive months. Lynwood will arrange for monthly bill inserts for three consecutive months or a line item on each bill explaining the surcharge to go to the Lynwood customers billed through HB&TS Utility District to the extent possible. In the event the City of Franklin or HB&TS Utility District ceases to provide billing on behalf of Lynwood, the Company will furnish such agreed notice in any successive billing service. The parties do not envision additional costs will be incurred as a result. Acceptable language for the line item on each bill and the bill insert are attached herewith as Exhibit 2.

18. Lynwood will provide an explanation of the surcharge in response to customer inquiries regarding the surcharge, in accordance with the acceptable notice language attached as Exhibit 2.

19. The breakdown of the costs that Lynwood will be authorized to recover is limited to only those set forth as follows.

- a. Chemical costs billed from ADC associated with odor control - \$6,501.35, (1) Σ (1) = 71,666.74
- b. Chemical costs billed from Brenntag Mid South, Inc. - \$665.39, (1)
- c. Labor Associated with Odor Control Measures Performed by Tennessee Contractors, Inc. - \$4,292.56,
- d. Sludge Removal Performed by Waste Management of Nashville Hauling - \$6,542.37, (2) Σ (2) = 13,604.97
- e. Sludge Removal Performed by First Response, Inc. - \$7,062.60, (2)
- f. Legal service fees associated with odor control - \$4,784.75, and
- g. Accounting service fees associated with odor control - \$1,125.00

/F

**V(b). Expenses**<sup>6</sup>

**V(b)1. SLUDGE REMOVAL EXPENSE**

The Company increased its 2008 test year Sludge Removal Expense of \$31,470 by 10% (\$3,147) based upon information from Waste Management, Inc., resulting in attrition period Sludge Removal of \$34,617.<sup>7</sup> The Consumer Advocate forecasts Sludge Removal Expense at \$31,470 which is the Company's 2008 test year amount, citing that the test year contained nonrecurring expenses which are being addressed in Docket 08-00060.<sup>8</sup> In rebuttal, the Company stated that the Consumer Advocate's forecasted Sludge Removal Expense is based upon the misunderstanding that a portion of the expense in the test year is being recovered via the sewer surcharge approved in Docket 08-00060.<sup>9</sup> The Company stated that it removed all charges funded by the sewer surcharge from the test period expense.<sup>10</sup>

The panel found that the Company provided sufficient evidence that the test year expense is normalized and contains no expense that is being recovered in the current surcharge. Therefore, the panel voted unanimously to adopt the Company's forecast of \$34,617 as the proper attrition period Sludge Removal Expense.

**V(b)2. PURCHASED POWER EXPENSE**

The Company increased its 2008 test year Purchased Power Expense by \$10,466 to reflect the anticipated 20% rate increase from the Tennessee Valley Authority and Middle Tennessee Electric Membership Corporation resulting in attrition period Purchased Power Expense of \$62,794.<sup>11</sup> The Consumer Advocate forecasted Purchased Power Expense at the

<sup>6</sup> The panel voted unanimously to accept the undisputed expense amounts projected by the parties for Purchased Wastewater, Chemicals, Materials and Supplies, Engineering Inspections, Testing, Repairs and Maintenance, Billing and Collection Fees, Bad Debt, Accounting and Bookkeeping, Tax Accounting, Accounting-Other, Legal, Management, Rent, Insurance, and Other Miscellaneous Expenses totaling \$332,127.

<sup>7</sup> James B. Ford, Pre-filed Direct Testimony, p. 4 (March 5, 2009).

<sup>8</sup> *Post-Hearing Brief of the Consumer Advocate*, p. 8 (September 11, 2009).

<sup>9</sup> James B. Ford, Rebuttal Testimony, p. 3 (July 31, 2009).

<sup>10</sup> *Id.*

<sup>11</sup> James B. Ford, Pre-filed Direct Testimony, p. 4 (March 5, 2009).

Lynwood Utilities Corp. TRA Docket #09-00034  
Comparison of Rate Making Components  
Company vs. Consumer Advocate  
For 12 Months Ending December 31, 2008

Schedule 2

Line #	Company 2008 Actual	ADJUSTMENTS	Consumer Advocate
1	Sewer Revenue - Usage Based	\$521,605 A/ \$0	\$521,605
2	Tap Fees	\$17,500 B/ (\$45,500) C/	\$63,000
3	Penalty Fees	\$8,163 D/ \$0	\$8,163
4	Inspection Fees	\$1,000 E/ \$0	\$0
5	Total Revenues	\$548,268 (\$45,500)	\$592,768
6	Purchased Wastewater	\$2,551 F/ \$0	\$2,551
7	Sludge Removal	\$34,617 G/ \$3,147	\$31,470
8	Purchased Power	\$62,794 H/ \$10,466 I/	\$52,328
9	Chemicals	\$42,450 J/ \$0	<u>\$42,450</u>
10	Materials & Supplies	\$20,502 K/ \$0	\$20,502
11	Engineering Inspections	\$2,701 L/ \$0	\$2,701
12	Testing	\$31,488 M/ \$0	\$31,488
13	Repairs & Maintenance	\$88,030 N/ \$0	\$89,030
14	Operations Management	\$28,800 O/ \$1,000	\$27,800
15	Billing and Collection Fees	\$44,966 P/ \$0	\$44,966
16	Bad Debt Expenses	\$10,334 Q/ \$0	\$10,334
17	Accounting and Bookkeeping	\$16,635 R/ \$0	\$16,635
18	Tax Accounting	\$2,850 S/ \$0	\$2,850
19	Accounting - Other	\$13,049 T/ \$0	\$13,049
20	Legal	\$8,899 U/ \$0	<u>\$8,899</u>
21	Management	\$16,000 V/ \$0	\$16,000
22	Rent	\$10,344 W/ \$0	\$10,344
23	Insurance	\$18,699 X/ \$0	\$18,699
24	Other Misc. Expenses	\$1,629 Y/ \$0	\$1,629
25	Taxes Other Than Income Taxes	\$20,716 Z/ (\$845)	\$21,561
26	Regulatory Expenses	\$33,524 AA/ \$8,371 BB/	\$25,153
27	Depreciation & Amortization, Net	\$121,569 CC/ (\$5,766) DD/	\$128,335
28	Total Operating Expense	\$ 834,147 \$ 15,373	\$ 618,775
29	Net Operating Income ("NOI")	\$ (85,879) \$ (60,873)	\$ (26,007)
Rate Base			
30	Plant In Service	\$ 3,122,341 EE/ \$ 211,089 FF/	2,911,252
31	Deferred Debits and Deposits	143,618 GG/ -	143,618
32	Cash Working Capital	52,574 HH/ 12,729 II/	39,845
33	Total	\$ 3,318,533 \$ 223,818	\$ 3,094,715
Less Deductions:			
34	Accumulated Depreciation	1,602,052 JJ/ 38,248 KK/	1,563,804
35	Contributions In Aid of Construction	687,524 LL/ (280,578) MM/	968,102
36	Total Deductions	2,289,576 (242,330)	2,531,906
37	Rate Base (line 38- Line 44)	<u>1,028,957</u> <u>466,148</u>	<u>562,809</u>

EO = 229,684



The panel found that the amount paid to Mr. Ring is reasonable and should not be based on the amount paid to other managers of much smaller companies. Therefore, the panel voted to adopt the Company's forecast for the Operations Management Expense of \$28,800.

#### **V(b)4. REGULATORY EXPENSE**

The Company forecasted Regulatory Expense of \$33,524 which included an annual amortization of the rate case expense resulting from this proceeding of \$12,000 (\$36,000 over three years).<sup>19</sup> The Consumer Advocate forecasts Regulatory Expense of \$25,153 which is \$8,371 less than the Company projection. The difference is comprised of \$6,000 in current rate case expense amortization and \$2,371 described as a non-recurring expense.<sup>20</sup>

The panel found that the Company's documentation showed that the regulatory costs are actual expenses and that the expenses incurred are reasonable. Therefore, the panel did not find sufficient evidence to reduce the Company forecasted Regulatory Expense by one-half. The panel further found that there was not sufficient evidence to explain why \$2,371 of the Company's forecasted regulatory expense should be considered non-recurring. Therefore, the panel voted unanimously to adopt the Company's forecast of \$33,524 Regulatory Expense to be the proper attrition period amount for this expense.

#### **V(b)5. COLLECTION SYSTEMS EXPENSE**

The Company projected \$121,569 for depreciation and amortization expense.<sup>21</sup> This amount consists of the 2008 test year net depreciation and amortization, inclusive of expense related to the Collection Systems Plant. The Consumer Advocate's original forecast was \$107,727, exclusive of the Collection Systems Plant.<sup>22</sup> In its supplemental testimony, however, the Consumer Advocate agreed with the Company that the Tennessee Department of

<sup>19</sup> James B. Ford, Pre-filed Direct Testimony, p. 5, Schedule E-5 and E-5/1 (March 5, 2009).

<sup>20</sup> Dave Peters, Direct Testimony, p. 4 and Schedule 6 (June 19, 2009).

<sup>21</sup> James B. Ford, Pre-filed Direct Testimony, Schedule R/E (March 5, 2009).

<sup>22</sup> Dave Peters, Direct Testimony, p. 5 (June 19, 2009).

BRANSTETTER, STRANCH & JENNINGS, PLLC

ATTORNEYS AT LAW  
227 SECOND AVENUE NORTH

FOURTH FLOOR  
NASHVILLE, TENNESSEE 37201-1631  
TELEPHONE (615) 254-8801  
FACSIMILE (615) 255-5419

CECIL D. BRANSTETTER, SR.  
C. DEWEY BRANSTETTER, JR.  
RANDALL C. FERGUSON  
R. JAN JENNINGS\*  
JOE P. LENISKI, JR.  
DONALD L. SCHOLES  
JAMES G. STRANCH, III  
J. GERARD STRANCH, IV  
JANE B. STRANCH

\*ALSO ADMITTED IN GA

ASSOCIATES:  
B. DENARD MICKENS  
STEVEN J. SIMERLEIN \*\*\*  
J. D. STUART  
MICHAEL J. WALL

OF COUNSEL:  
ROBERT J. RICHARDSON, JR. \*\*

\*\*ONLY ADMITTED IN OH  
\*\*\*ONLY ADMITTED IN CA

March 5, 2009

Eddie Roberson, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

*Via Hand Delivery*

filed electronically in docket office on 03/05/09

Attention: Sharla Dillon

Re: Petition of Lynwood Utility Corporation To Change and Increase Rates and  
Charges  
Docket No. 09- 00034

Dear Chairman Roberson:

Enclosed please find the original and thirteen copies of a Petition to be filed on behalf of our client, Lynwood Utility Corporation (the Company), pursuant to T.C.A. § 65-5-203. I am simultaneously, with the filing of this Petition, filing with Ms. Pat Murphy certain tariffs for Company, which are explained and discussed in the Petition and which tariffs have an issue date of March 5, 2009, and an effective date of April 4, 2009.

I am enclosing the original and thirteen copies of the pre-filed testimony and exhibits of Tyler Ring and James B. Ford who will testify on behalf of the Company.

The entire contents of this filing in PDF format are also contained on a compact disc filed herewith. Also, I have emailed to Ms. Sharla Dillon an electronic version in PDF format of the Petition, the testimony, their exhibits, and the tariff filings.

Also enclosed is our check in the amount of \$25.00, payable to the Tennessee Regulatory Authority for the filing fee.

Please return one copy of the Petition and sworn testimony and exhibits, which I would appreciate your stamping "filed," and returning to me.



**LYNWOOD UTILITY CORPORATION**  
**REGULATORY EXPENSES**  
**12/31/2008**

**SCHEDULE E-5**

*not broken out*

		Per Book	Adjustment	As Adjusted
667	REGULATORY EXPENSES	\$ 17,371	\$ 12,000 (1)	\$ 29,371
408.1	UTILITY REGULATORY ASSESSMENT FEE	4,153		4,153
	TOTAL REGULATORY EXPENSES	<u>\$ 21,524</u>	<u>\$ 12,000</u>	<u>\$ 33,524</u>

(1) 2009 Rate Case Expense \$36,000 ÷ 3 years → *From Schedule E-5/1*

**LYNWOOD UTILITY CORPORATION**  
**2009 RATE CASE EXPENSES**  
**12/31/2008**

SCHEDULE E-5/1

ACCOUNTING	\$	16,000	
LEGAL		18,000	
EXPENSES, FEES, COPIES ETC.		<u>2,000</u>	
	\$	<u>36,000</u>	
		<u>+3</u>	
	\$	12,000	per year

16

the City of Franklin's tariff are not known and those terms are subject to change in the future. Therefore, there is no way to craft a comparable and/or fair late payment assessment for those customers billed directly by Berry's Chapel.

### **OPERATING EXPENSES**

Generally, the Consumer Advocate's methodology for forecasting operating expenses consists of starting with actual test period expense, normalizing for non-recurring items, out-of-period expense and accruals, eliminating non-documented and/or inappropriate expenses and adjusting for known changes during the attrition period. For those expenses that are driven primarily by inflation, the Consumer Advocate then applied its inflation factor. The panel finds that this is the correct approach to use and adopts the inflation factor used by the Consumer Advocate, as noted previously.

After reviewing the Company information, along with the Consumer Advocate's adjustments, the panel adopts the Consumer Advocate's forecasts for the following operating expenses: Purchased Water of \$7,462, Sludge Removal of \$39,691, Purchased Power of \$62,171, Chemicals of \$44,093, Engineering Inspections of \$4,027, Testing of \$14,326, Repairs & Maintenance of \$49,404, Operations Management of \$56,001, Billing & Collection Fees of \$35,559, Bad Debt Expenses of \$6,868, Accounting & Bookkeeping of \$16,274, Tax Accounting of \$857, Accounting-Other of \$8,670, Legal of \$12,695, Taxes Other Than Income of \$41,040, and Depreciation Expense of \$145,116.

30 = 24,944

For five of the expense categories, however, the panel finds that the Company made compelling rebuttal arguments to some of the expense amounts eliminated by the Consumer Advocate. Accordingly, the panel adopts amounts different than the Consumer Advocate's forecast for the following expense categories: Materials and Supplies, Rent, Insurance, Other Miscellaneous Expense, and Regulatory Expense.

\$48,613 in the original filing. In his Rebuttal Testimony, Mr. Ford increases the total to \$71,780.<sup>47</sup> The Consumer Advocate started with 2011 actual expense, normalized and made adjustments for unsupported items, non-recurring expense, duplications, and inappropriate expense and then grew this amount by 2% for inflation to arrive at the forecasted attrition period amount of \$18,409.<sup>48</sup>

It was discovered that a missing invoice for office supplies in the amount of \$261 was inadvertently deducted twice in the Consumer Advocate's normalizing process.<sup>49</sup> With this correction, the calculation of the normalized test period is \$18,309. When grown by 2% inflation, the corrected Consumer Advocate attrition period expense is \$18,675.<sup>50</sup> At the Hearing on May 31, 2012, Mr. Ford clarified that the invoices for gas that the Consumer Advocate disallowed (totaling \$3,931) were for the truck used for utility business.<sup>51</sup> The panel adopts the corrected Consumer Advocate amount of \$18,675 plus \$4,010<sup>52</sup> for gas to arrive at an attrition period expense of \$22,685 for Other Miscellaneous Expense.

**Regulatory Expense** - Mr. Ford's testimony indicates that he grew the \$48,898 test period amount by \$21,500<sup>53</sup> to arrive at his forecasted amount of \$70,398 for the attrition period.<sup>54</sup> In Rebuttal Testimony, Mr. Ford adjusted this expense downward to \$51,937 to include, in addition to rate case expense, the actual 2011 booked regulatory expenses of \$19,937.<sup>55</sup> The regulatory expense of \$19,937 includes TRA Inspection Fee, Tennessee Department of Environment and Conservation ("TDEC") permit fee, the cost of TRA reporting, the cost of Comptroller's assessment reporting, the cost of monthly reporting to TDEC, and other

<sup>47</sup> James B. Ford, Pre-Filed Rebuttal Testimony, Schedules JBF-5/3 and JBF-5/4 (May 22, 2012).

<sup>48</sup> Dave Peters, Pre-Filed Direct Testimony, p.12 and attached workpaper Schedule 2 (April 23, 2012).

<sup>49</sup> Transcript of Proceedings, pp. 10-11 (June 8, 2012).

<sup>50</sup> Id. at 11.

<sup>51</sup> Transcript of Proceedings, pp. 97-99 (May 31, 2012).

<sup>52</sup> This amount is \$3,931 increased by 2% inflation factor.

<sup>53</sup> This amount is derived from current rate case expense of \$43,000 amortized over 2 years.

<sup>54</sup> James B. Ford, Pre-Filed Direct Testimony, Schedule R/E (November 15, 2011).

<sup>55</sup> James B. Ford, Pre-Filed Rebuttal Testimony, Schedule JBF-5/6 (May 22, 2012).

miscellaneous expenses related to regulatory reporting.<sup>56</sup> Mr. Peters' testimony outlines the significant differences between the Consumer Advocate and the Company in Regulatory Expense for the attrition period. Further, Mr. Peters states that the Company's amount of \$70,398 is more than a 100% increase over the amount awarded for regulatory expenses in the Company's last rate case.<sup>57</sup> The 2011 actual amount is \$57,037.<sup>58</sup> The Consumer Advocate, therefore, included only the current rate case expense of \$43,000, amortized over three years or \$14,333.<sup>59</sup>

In its Rebuttal Testimony, the Company adjusted attrition period expense to include actual booked regulatory expenses for 2011, as noted above, and a forecasted amount of \$64,000 for this rate case, amortized over two years.<sup>60</sup> At the hearing on May 31, 2012, Mr. Ford enumerated the regulatory expenses that made up the \$14,000 excluded by the Consumer Advocate.<sup>61</sup> Additionally, during Cross Examination by the Consumer Advocate, Mr. Ford testified that the \$41,000 for legal expense was low, since he already had bills totaling \$55,000 - \$60,000.<sup>62</sup>

Based on Mr. Ford's testimony at the Hearing, the panel adopts the Company position on rebuttal of \$51,937 for Regulatory Expense as it compares favorably to the actual 2011 expense discussed in the Consumer Advocate's Direct Testimony. This amount includes a total of \$64,000 in rate case expense amortized over two years.

<sup>56</sup> James B. Ford, Pre-Filed Rebuttal Testimony, p. 10 (May 22, 2012).

<sup>57</sup> Dave Peters, Pre-Filed Direct Testimony, p. 14 (April 23, 2012).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> James B. Ford, Pre-Filed Rebuttal Testimony, Schedule JBF-5/6-1 (May 22, 2012).

<sup>61</sup> Transcript of Proceedings, p. 22 (lines 22-25) through p. 23 (lines 1-9) (May 31, 2012).

<sup>62</sup> Transcript of Proceedings, p. 71 (lines 14-22) (May 31, 2012).

filed electronically in docket office on 05/22/12

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

IN RE: PETITION OF BERRY'S CHAPEL	)	
UTILITY, INC. TO CHANGE AND	)	DOCKET NO. 11-00198
INCREASE RATES AND CHARGES	)	

REBUTTAL TESTIMONY OF  
JAMES B. FORD, SECRETARY-TREASURER  
TO BERRY'S CHAPEL UTILITY, INC.

Dated: May 15, 2012



d. Dye, Van Mol & Lawrence (DVL) aids BCUI in customer communications that have been of large customers and TRA concern. Meetings with the customers and Homeowners Associations revealed many customer concerns and a poor level of trust of the company. DVL was retained to assist the company in providing better customer knowledge of the problem BCUI was facing. The level of distrust was increased when the CAPD attorneys wrote directly to 75 customers (without BCUI knowledge) requesting that the customer dispute their bill and complain to the TRA. This increased expenses related to Regulatory costs (both internal and legal) and at December 31, 2011, past due accounts have increased to approximately \$25,000 with several customers having past due balances between \$600 and \$1,000. The CAPD implied that if BCUI tried to collect these balances a civil action would be taken against BCUI by the Attorney General Office. As a result, no further collection actions were taken on these accounts.

\$2,945.00

e. Gas – fuel for BCUI F150 truck

\$3,931.00

Total Misc Expenses that CAPD should not deduct:

\$10,441.00

#### 11) Regulatory Expenses

- a. Rate Case expense – see JBF – 5/6 for Rate Case Expenses of \$64,000 (\$32,000 for 2 years) which is low considering all of the detail and problems that CAPD has had. Legal costs will increase by additional \$20,000 over the \$41,000 and expenses will be \$4,000 over the estimate due to very large amounts of detail requested by CAPD (4 times prior case) (\$32,000). BCUI last rate case expenses were amortized over 2 years.
- b. Ongoing regulatory expense that the CAPD does not consider is TRA inspection fee of \$3,000, TDEC permit fee of \$2,000. Cost of TRA reporting (Qrt & Annual reports) \$4,000, Comptroller Assessment reporting \$2,000, Monthly Testing Reporting to TDEC \$3,000 and other misc filing Requirements by TRA (Financial Security filings, Surcharge Tracking filings) ~~\$6,000~~ along with other miscellaneous items. The estimate of \$24,000 makes BCUI annual amount reasonable and CAPD deductions should not be made for:

\$14,000



Select Authorized Costs Approved in Tariffs				
Select Costs	Rate Case 07-00007 /A	Odor Control Surcharge 08-00060 /B	Rate Case 09-00034 /C	Rate Case 11-00198 & Flood Damage 11-00180 /D
Sludge removal	20,000.00	13,604.97	34,617.00	39,691.00
Chemicals	20,870.00	7,166.74	42,450.00	44,093.00
Accounting (excluding Tax Accounting)	-	1,125.00	29,684.00	24,944.00
Legal Expenses	-	4,784.75	8,899.00	12,695.00
Rate Case Expense	26,400.00	-	36,000.00	64,000.00
Regulatory Expense (legal fees portion)	-	-	-	6,000.00
Total of Select Costs	67,270.00	26,681.46	151,650.00	191,423.00

/A: Per *Order Approving Settlement Agreement*, Docket No. 07-00007, Ex. Schedules 2 and 2-9 (Dec. 11, 2007). The order does not provide the precise amount of accounting and legal expenses included in "Contractual Services", which had an authorized recovery of \$196,147.

/B: Per *Order Approving Settlement Agreement*, Docket No. 08-00060, pg. 5 (Apr. 29, 2009).

/C: Per *Final Order*, Docket No. 09-00034, pgs. 5, 7 (Nov. 3, 2009). Footnote 6 cites approval of undisputed expenses, which are shown in *Supplemental Direct Testimony of Dave Peters*, Sch. 2 (Aug. 14, 2009).

/D: Per *Final Order*, Docket No. 11-00198, pgs. 8, 11-12 (Aug. 21, 2012). Footnote 56 cites the detail of the regulatory expenses shown in *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, pg. 10 (May 22, 2012). The *Final Order* includes authorized cost recovery under both Docket No. 11-00198 and 11-00180, which were consolidated in *Order Consolidating Dockets and Amending Procedural Schedule*, Docket Nos. 11-00180 and 11-00198 (May 7, 2012).



evidence would be admissible if no other copy of a record were available. Rule 1005 expresses no preference for the type of secondary evidence that can then be used.

Compliance with Rule 1005, of course, does not mean that the copy of the public record is admissible in evidence. Even if Rule 1005 is satisfied, the proponent of the evidence must still comply with all other relevant evidence rules and laws. A frequent issue is whether the record, though properly authenticated under Rules 902 and 1005, also satisfies the public records hearsay exception, Rule 803(8).<sup>75</sup>

#### § 10.06 Rule 1006. Summaries

##### [1] Text of Rule

###### Rule 1006 Summaries

**The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable times and places. The court may order that they be produced in court.**

##### Advisory Commission Comment:

Summaries of the contents of voluminous documents have long been admissible in Tennessee. *State ex rel. Stewart v. Hollis*, 140 Tenn. 513, 521, 205 S.W. 444 (1918).

##### [2] Admission of Summaries: In General

Counsel will often present a judge or jury with a summary of evidence presented in the case. This summary is designed to make it easier for the trier of fact to understand voluminous or complex proof. The summary can be in the form of a written<sup>76</sup> or oral<sup>77</sup> conclusion, chart, table, map, videotape,<sup>78</sup> photograph, or calculation. The summary itself may be used in two ways. First, it can be offered as substantive evidence.

Second, the summary may be used as a pedagogical tool or demonstrative evidence that assists the jury in understanding and organizing other

<sup>75</sup> See, e.g., *State v. ...*

<sup>76</sup> See, e.g., *United States v. Leon Reyes*, 77 F.3d 816 (9th Cir. 1997) (summary of testimony of witness that was admissible to prove nationality in a perjury trial because it was based on actual transcript of previous trial which contained undisputed material).

<sup>77</sup> See, e.g., *United States v. Walker*, 191 F.3d 526, 2d Cir. 1999, permitting immigration judge, specialist to testify that no previous applications of defendant's office, to be similar to others already in evidence, the applications previously had been admitted into evidence.

<sup>78</sup> See, e.g., *United States v. Rivera-Mendoza*, 194 F.3d 273, 1st Cir. 1999, applying admission of videotapes of defendant's previous admissions of guilt, videotapes of drug transactions.

evidence, but is not substantive evidence itself.<sup>79</sup> Frequently, the second use of a summary occurs during closing argument when counsel attempts to provide a structure for the jury to use in analyzing the evidence.

The normal rules of relevance, Rules 401 and 403, limit the second use of summaries.<sup>80</sup> The jury may be instructed on the proper, limited use of summaries presented for this second purpose.<sup>81</sup> Rule 1006 regulates the first use of a summary, when the summary itself is offered as substantive evidence.

### [3] Summaries of Writings

Tennessee Courts have long recognized the difficulty inherent in the presentation of voluminous written proof, such as all of the books and records of a business.<sup>82</sup> As noted in the Tennessee Advisory Commission Comment to Rule 1006, the case of *State ex rel. Stewart v. Follis*,<sup>83</sup> stands for the proposition that summaries of the contents of voluminous records are admissible as substantive evidence because the underlying records themselves would be difficult and time consuming to interpret. This case, and a number of others, established certain criteria that must be met in order for such a summary to be admissible as substantive evidence.<sup>84</sup>

Rule 1006 follows these precedents and admits, as substantive evidence, summaries of certain voluminous writings. The trial court is given much discretion in determining whether the evidence is sufficiently voluminous to justify a summary. The court may admit such summaries even if the original documents do not contain complex calculations.<sup>85</sup> Since summaries are

<sup>79</sup> See above §§ 4.01[20].

<sup>80</sup> See below § 10.06[6].

<sup>81</sup> Cf. *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998) (trial court should not give limiting instruction when summaries are substantive evidence rather than pedagogical device).

<sup>82</sup> It should be noted that a summary of a business record may itself be a business record if it satisfies Rule 803(6). If so, Rule 1006 is inapplicable.

<sup>83</sup> 140 Tenn. 513, 521, 205 S.W. 444, 445-46 (1918).

<sup>84</sup> See, e.g., *State v. Purkey*, 689 S.W.2d 196, 200 (Tenn. Crim. App. 1984) (charts and graphs of voluminous bank records admissible); *Evans v. Boggs*, 35 Tenn. App. 354, 245 S.W.2d 641 (1951) (summaries or audits of voluminous corporate records of accounts of business transactions were admissible); *International Union, United Auto., Aircraft and Agr. Implement Workers of Am., AFL-CIO v. American Metal Prods. Co.*, 56 Tenn. App. 526, 408 S.W.2d 682 (1964) (comptroller was properly permitted to testify regarding financial matters from summaries he had prepared from voluminous company accounting records previously made available to adverse parties); *Alexander v. Inman*, 903 S.W.2d 686, 702 (Tenn. Ct. App. 1995) (summary of two law firms' business records recording number of hours devoted to particular case were admissible in suit to assess whether lawyers' bills were reasonable).

<sup>85</sup> See *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985) (summary permitted because there were eight documents for each of 105 applicants).

often prepared for the purpose of litigation, their admissibility is not denied because they were compiled with litigation in mind.<sup>86</sup>

In order to be admissible, the summary must consist of and be limited to facts or data that the testifying witness personally observed from an examination of the records, Rule 602. Unless the witness is an expert, ordinarily the testimony must be factual testimony rather than opinion testimony.<sup>87</sup> The foundation witness will need to establish that (1) the original evidence is voluminous, and (2) the summary is sufficiently accurate in representing the original evidence.

In order to permit verification of the accuracy of the summary, Rule 1006 states that the underlying records must be made available to the adverse party.<sup>88</sup> In addition, the court may require that the underlying records be produced in court.<sup>89</sup>

Additionally, the chart, summary, or calculations can be properly excluded from evidence if the underlying original documents would themselves be inadmissible.<sup>90</sup> For example, if the underlying documents are hearsay that are not made admissible by virtue of an exception, such as the business records exception, or not otherwise made admissible to support expert testimony pursuant to Rule 703,<sup>91</sup> the chart, summary, or calculation will be excluded.<sup>92</sup> This principle does not mean, however, that the underlying data actually must be admitted into evidence. Often the voluminous underlying data could be admitted but the parties elect not to do so and to rely solely on a summary, which is admitted into evidence.<sup>93</sup>

<sup>86</sup> *Fusner v. Coop Constr. Co., LLC*, 211 S.W.3d 686, 693 (Tenn. 2007).

<sup>87</sup> *See, e.g., United States v. Wood*, 943 F.2d 1048 (9th Cir. 1991) (chart inadmissible because not supported by proof).

<sup>88</sup> *Evans v. Boggs*, 35 Tenn. App. 354, 245 S.W.2d 641 (1951); *International Union, United Auto., Aircraft and Agr. Implement Workers of Am. AFL-CIO v. American Metal Prods. Co.*, 56 Tenn. App. 526, 569-70, 408 S.W.2d 682, 702 (1964). *See below* § 10.06[5].

<sup>89</sup> TESS. R. EVID. 1006.

<sup>90</sup> *Alexander v. Inman*, 903 S.W.2d 686, 702 (Tenn. Ct. App. 1995) (accountant's summary of business records, separately admissible under business records hearsay exception, should have been admitted); *See also United States v. Oros*, 578 F.3d 703 (7th Cir. 2009) (summaries of telephone and bank records inadmissible because proponent did not lay foundation that the records themselves were admissible business records under Rule 803(6)).

<sup>91</sup> Rule 703 clearly allows an expert to base his or her testimony on certain reliable information not itself admissible. This means that the expert's opinion testimony may, in actuality, involve a summary of data not itself admissible. Rule 705 authorizes the court to require the expert to disclose the underlying data on cross examination. If the expert uses a chart or other forms covered by Rule 1006, then Rule 1006's disclosure requirements must be satisfied.

<sup>92</sup> *See, e.g., United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) (summary of inadmissible bank documents).

<sup>93</sup> *See, e.g., United States v. Bakker*, 723 F.2d 728 (4th Cir. 1991) (all composite

[4

Ra  
only  
subst  
will  
an et  
impe  
cont  
cont  
made  
also

[5

Ra  
accu  
are t  
dupl  
to th  
and  
adm  
insp  
A  
prop  
sum  
sort  
is to  
tion  
time  
A  
have

vide  
94  
1975  
comm  
con  
95  
at v  
ares  
App  
vide  
1974  
96  
1975

#### [4] Summaries of Other Evidence

Rule 1006 expands Tennessee common law by permitting summaries not only of writings, but also of recordings and photographs, to be admissible as substantive evidence. Although the circumstances in which this expansion will be useful are probably somewhat limited, when applicable this can be an effective trial technique and may be the only practical way to present important proof. For example, in a case in which the issue involved the contents of tape recordings of 3,000 telephone calls, a summary of the contents of the calls was admissible when the recordings themselves were made available to the adverse party.<sup>94</sup> A transcript of a tape recording has also been found to satisfy the best evidence rule.<sup>95</sup>

#### [5] Examination of Originals by Other Parties; Notice

Rule 1006 uses the adversary system to ensure that summaries are accurate and the trier of fact is not misled. The rule states that if summaries are used, the other parties are entitled to examine and copy the originals or duplicates at reasonable times and places. The obligation to provide access to the underlying data is a prerequisite to using a summary under Rule 1006 and is independent of ordinary discovery practice. The summary is not admissible under Rule 1006 if the underlying data are not available for this inspection.<sup>96</sup>

Although Rule 1006 does not specifically mandate pretrial notice, the proponent of a summary under this rule may have to provide it anyway if the summary is based on voluminous items that will take considerable time to sort through. The reason is that Rule 1006 mandates that when a summary is to be used, the originals or duplicates providing the underlying information "shall be made available for examination or copying . . . at reasonable times and places."

Absent pretrial notice of a party's intent to use a summary, the court may have to suspend proceedings to allow the adverse party to go over the

videotapes taken from 200 hours of broadcasts)

<sup>94</sup> *United States v. Clements*, 588 F.2d 1030, 1039 (5th Cir.), *cert. denied*, 440 U.S. 982 (1979). *See also* *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) (admitting 11 composite tapes of television evangelist's efforts to raise funds; the original tapes would have taken 200 hours to be heard).

<sup>95</sup> *State v. Coker*, 746 S.W.2d 167, 172 (Tenn. 1987) (pre-rules decision, admitting transcript of poorly recorded tape recording after judge compared original tape recording with transcript to ensure accuracy). *See also* *State v. Mosher*, 755 S.W.2d 464, 469 (Tenn. Crim. App. 1988) (jurors were given a transcript of a tape recording to read while listening to the actual recordings, and were instructed that the tape recordings are the real evidence if there is a conflict between the tapes and the transcript, no best evidence violation).

<sup>96</sup> *See, e.g., United States v. Modena*, 302 F.3d 626 (6th Cir. 2002) (summaries of financial transactions inadmissible because the underlying records were not made available by the party offering the summaries).



underlying data so that the summary can be assessed and challenged. A good model is to discuss the issue at a pretrial conference and perhaps schedule access to both the summary and the underlying data, well in advance of trial. Notice would be especially helpful if it clearly identified the charts or other evidence to be introduced as summaries covered by Rule 1006, listed the documents underlying the summary, and indicated when and where the underlying items can be examined and copied.<sup>97</sup> Delaying such notice until the summary is to be introduced could lead to exclusion of the summary because of the failure to provide "reasonable" access to the information being summarized.

Counsel opposing admission of a summary under Rule 1006 should make efforts to demand access to the underlying data. Failure to do so can be viewed unfavorably by an appellate court.<sup>98</sup>

#### **[6] Applicability of Rules 401 and 403**

Although Rule 1006 provides that a summary of writings, recordings, or photographs may be admitted, this proof may still be excluded by Rules 401 and 403. If the summary is incomplete or inaccurate, it may be excluded as irrelevant under Rule 401. Similarly, if the summary has little probative value, the trial court can exclude it under Rule 403 if the probative value is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury. Another option is for the summary to be altered to remove the objectionable features.<sup>99</sup>

### **§ 10.07 Rule 1007. Testimony or Written Admission of Party**

#### **[1] Text of Rule**

##### **Rule 1007 Testimony or Written Admission of Party**

**Contents of writings, recordings, or photographs may be proved by the testimony, deposition, or written admission of the party against whom offered, without accounting for nonproduction of the original.**

##### **Advisory Commission Comment:**

This rule dispenses with the original document requirement in the circumstances described. Note that the proposed rule requires an unsworn statement of the contents of a document to be in writing.

#### **[2] Admissibility of Testimony or Written Admission**

##### **[a] In General**

Rule 1007, an exception to Rule 1002, dispenses with the original writing

<sup>97</sup> See *Air Safety v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 8 (1st Cir. 1996).

<sup>98</sup> See *R & R Associates, Inc. v. Visual Scene, Inc.*, 726 F.2d 36 (1st Cir. 1984).

<sup>99</sup> See, e.g., *United States v. Drougas*, 748 F.2d 8, 26 (1st Cir. 1984) (charts of telephone calls modified to remove argumentative inferences).